

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

FEDERAL TRADE COMMISSION,)
Plaintiff,)
vs.) CASE NO. 2:14-CV-88DB
APPLY KNOWLEDGE, a Utah limited)
liability company, et al.,)
Defendants.)
_____)

BEFORE THE HONORABLE DEE BENSON

January 30, 2015

Motion Hearing

A P P E A R A N C E S

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January 30, 2015

2:00 p.m.

P R O C E E D I N G S

THE COURT: Good afternoon.

MR. McNULTY: Good afternoon.

THE COURT: We're here in a case. How about that?

This is the plaintiff's motion. The plaintiff is moving to dismiss the Sonnenberg defendants counterclaim. The case is Federal Trade Commission versus Apply Knowledge, L.L.C. and others. The case number is 14-CV-88. The plaintiff, Federal Trade Commission, is represented by who?

MR. McNULTY: Good afternoon, Your Honor. Connell McNulty on behalf of the Federal Trade Commission along with Collot Guerard.

MS. GUERARD: Good afternoon, Your Honor.

THE COURT: Tell me the name again.

MS. GUERARD: It is hard. It is Collot, like hello hello, and the last name is Guerard. I joined the case after the preliminary injunction.

THE COURT: I see your name on the brief now. Collot Guerard. Thank you.

You're here from Washington, are you?

MS. GUERARD: Yes, sir.

THE COURT: And you are from Pennsylvania?

MR. McNULTY: Originally, yes.

1 THE COURT: Okay. Well, it is nice to see you.

2 Are you local here? Where do you reside?

3 MR. McNULTY: We are in Washington, Your Honor.

4 THE COURT: Both of you? You have a P.A. before
5 your bar number, and I guess that is what is making me think
6 Pennsylvania.

7 MR. McNULTY: I was in private practice in
8 Pennsylvania, Your Honor.

9 THE COURT: You are both out here from Washington,
10 D.C.

11 MR. McNULTY: Yes.

12 THE COURT: Nice to have you here.

13 Jonathan Hafen is here. Is this Ms. Nielson with
14 you at counsel table?

15 MR. HAFEN: Yes, it is, Your Honor.

16 THE COURT: Sara Meg Nielson.

17 MS. NIELSON: Yes.

18 THE COURT: Nice to have you here.

19 We have Ms. Priest back there. Katherine Priest.

20 MS. PRIEST: Yes.

21 THE COURT: She represents what I'll call the
22 Essent Media defendants. They are not involved in this
23 motion, but there is a related issue, somewhat related to
24 this one, quite related I think in many respects, and that
25 is a pending motion for an order approving the windup of the

1 receivership estate and related relief, including approving
2 and authorizing payment for receivership assets of the
3 temporary receiver's and professionals' fees and expenses.

4 I wonder if we could have figured out a way to
5 make that any longer?

6 That is another pending matter.

7 You can have a seat, Ms. Priest. Nice to have you
8 here. I'll have to maybe ask a question or two about that
9 as we go along.

10 Let's turn first to the motion before the Court,
11 which is your motion, Mr. McNulty.

12 MR. McNULTY: Yes, Your Honor.

13 THE COURT: Are there any other attorneys in the
14 room that want to make an appearance? No.

15 MR. McNULTY: Good afternoon, Your Honor.

16 May it please the Court, my name is Connell
17 McNulty, and I, along with my co-counsel, Collot Guerard,
18 represent the Federal Trade Commission, the movant in
19 today's argument. Under Rules 12(b)(1) and 12(b)(6) of the
20 Federal Rules of Civil Procedure we ask the Court to dismiss
21 the Sonnenbergs' sole counterclaim for wrongful injunction.
22 It is barred by sovereign immunity.

23 This Court recently visited the Federal Tort
24 Claims Act in its decision in U.S. vs. Daly, issued a few
25 days ago. The Court held that in the absence of a waiver of

1 sovereign immunity, the federal government is immune from
2 suit, citing Dahl, a Tenth Circuit case. The Federal Tort
3 Claims Act provides the exclusive avenue to bring a tort
4 action claim against the United States, notwithstanding
5 other statutes that permit the government to be sued as the
6 court recognized.

7 The viability of the Sonnenbergs' wrongful
8 injunction claim begins and ends with the Federal Tort
9 Claims Act. Congress enacted the Federal Tort Claims Act as
10 a limited waiver of sovereign immunity for certain tort
11 claims against the United States. However, in an express
12 reservation of sovereign immunity, Congress provides in the
13 Act that district courts shall not have jurisdiction over
14 tort claims against the United States arising out of
15 malicious prosecution and abuse of process, among other
16 intentional torts. The Sonnenbergs' wrongful injunction
17 claim is an intentional tort and it is barred by sovereign
18 immunity.

19 In support of their wrongful injunction claim, the
20 Sonnenbergs allege that the Federal Trade Commission sought
21 an injunction based on allegations that it knew to be
22 untrue, with an improper purpose, and with the objective of
23 discrediting the Sonnenberg defendants and with animus.
24 These allegations, each of which is false, are unequivocal
25 allegations of intentional conduct that sound in abuse of

1 process and malicious prosecution, two intentional torts for
2 which Congress has expressly reserved sovereign immunity for
3 the United States. Congress's reservation of sovereign
4 immunity for wrongful injunction claims, like the
5 Sonnenbergs, deprive this Court of jurisdiction over the
6 counterclaim.

7 Further, even if sovereign immunity did not bar
8 the counterclaim, which it does, the Sonnenberg defendants
9 seek damages improperly against the Federal Trade Commission
10 itself. The Federal Tort Claims Act does not waive
11 sovereign immunity for direct tort claims against federal
12 agencies such as the F.T.C. Rather, through the F.T.C.A.
13 Congress waives sovereign immunity for certain tort claims
14 against the United States, not against federal agencies.
15 Thus, under the Act district courts have no jurisdiction
16 over Federal Tort Claims Act claims that are brought against
17 federal agencies such as this one.

18 Finally, the Sonnenbergs have not complied with
19 the procedural requirements of the Federal Tort Claims Act.
20 Under the Act claimants must file administrative claims with
21 the federal agency at issue. This notice requirement is
22 strictly construed and it is jurisdictional. The
23 Sonnenbergs did not file any such claim. Given their
24 failure to follow the Federal Tort Claims Act and its
25 procedural requirements, this Court lacks jurisdiction over

1 the counterclaim.

2 Each of these points we made in our motion to
3 dismiss papers. The Sonnenberg defendants have contested
4 none of them. The Court, therefore, has before it a motion
5 to dismiss for lack of jurisdiction and failure to state a
6 claim. The allegations in the counterclaim are for
7 intentionally tortious conduct in seeking an injunction,
8 conduct for which Congress has reserved sovereign immunity.
9 Sovereign immunity is jurisdictional, Your Honor. If, as
10 here, the United States has not consented to suit, has not
11 waived its sovereign immunity, jurisdiction is absent and no
12 claim can be stated or maintained as a matter of law.

13 We request time for rebuttal, and if you have any
14 additional questions we are available to answer them.

15 THE COURT: Well, you know what they said in their
16 opposition, and they are really not challenging anything you
17 have said so far, but you want to respond after Mr. Hafen
18 addresses me?

19 MR. McNULTY: I think it is best that the
20 Sonnenbergs make their own case and then we can respond if
21 it pleases Your Honor.

22 THE COURT: Thank you.

23 Mr. Hafen.

24 MR. HAFEN: Good afternoon, Your Honor.

25 I guess there is one thing we can agree on, and

1 that is that you have to waive sovereign immunity, but where
2 we seem to be missing each other is the type of claim that
3 this is. Everything that you just heard presumes that this
4 claim somehow is an intentional tort and that is not right.
5 We are moving under a contract based claim for wrongful
6 injunction, and we are also moving under the Equal Access To
7 Justice Act under Rule 65(c) of the Federal Rules of Civil
8 Procedure.

9 So the question before the Court I think today is
10 whether the Equal Access To Justice Act waives immunity for
11 purposes of a claim under Rule 65(c) and the answer is
12 absolutely. We have the language of 2412 itself, which is
13 the Equal Access To Justice Act, and, in addition, we have
14 some extremely helpful legislative history, and that is not
15 something that we have talked to the Court about in the
16 pleadings directly, so I wanted to make sure that I
17 highlighted that for you today.

18 Let me just start with the language of the two
19 statute under the Equal Access To Justice Act. First of
20 all, 2412(d), which is the one that clearly applies here,
21 and this is a waiver of sovereign immunity, and it says
22 unless expressly prohibited by statute, a Court may award
23 reasonable fees and expenses of attorneys, in addition to
24 the costs which may be awarded pursuant to subsection A, to
25 the prevailing party in any civil action brought by or

1 against the United States or any agency or any official of
2 the United States acting in his or her official capacity, in
3 any court having jurisdiction of such action. Well, we know
4 the Court has jurisdiction over the F.T.C.'s actions, so
5 that means the Court has jurisdiction over whatever may come
6 next.

7 Here is what comes next. The United States shall
8 be liable for such fees and expenses to the same extent that
9 any other party would be liable under the common law or
10 under the terms of any statute which specifically provides
11 for such an award. That is 2412(b).

12 The other part of that statute that we are moving
13 under is 2412(d)(1)(a). This is much broader. B requires a
14 statute, and Rule 65(c) is a statute, and I will show that
15 to the Court in just a minute, but under D this is much
16 broader and allows fees and other expenses and does not
17 require a statute, but it does have a provision with respect
18 to whether or not the United States' position was
19 substantially justified.

20 What we intend to do is file a motion, assuming
21 that the counterclaim survives as it should, we intend to
22 file a motion under Rule 65(c) seeking fees and costs under
23 2412(b) for a wrongfully entered injunction.

24 Now what I want to do is move to the Adamson case,
25 which I think is really important here. The Adamson case is

1 a Tenth Circuit case from 1988. The Adamson case talks
2 about the Equal Access To Justice Act in these circumstances
3 where a party wishes to move for fees and expenses because
4 of what is provided under one of the Federal Rules of Civil
5 Procedure. Let me just give you a few quotes. The Equal
6 Access To Justice Act expressly waives immunity against
7 attorneys' fees awards. Under 2412(b) of the E.A.J.A. the
8 United States is liable for attorneys' fees to the same
9 extent that any other party would be liable under the common
10 law or under the terms of any statute which specifically
11 provides for such an award.

12 This section, enacted in 1980 and remaining in
13 force to the present, would appear on its face to be
14 sufficiently broad to waive the government's immunity from
15 fee awards pursuant to the Federal Rules of Civil Procedure
16 which have, quote, the force of a federal statute, close
17 quote, citing the Cibock case, a Supreme Court case from
18 1941. That looks pretty good. If we're moving under Rule
19 65(c), it looks like immunity has been waived.

20 Now let's talk about the legislative history.
21 Going on in Adamson, the legislature history of Section
22 2412(b) supports this view of the E.A.J.A. waiver. Section
23 5 of the original E.A.J.A. expressly addresses fees awarded
24 pursuant to the Federal Rules of Civil Procedure and
25 demonstrates Congress's intent that the E.A.J.A. waives

1 government immunity.

2 Now let's talk briefly about the legislative
3 history. There, again, is another quote from that same
4 case. The legislative history also supports this result by
5 showing that Congress's key focus was that government and
6 private litigants become and remain subject to fees and
7 expenses in a parallel manner. The house report states,
8 quote, that the change encompassed in Section 2412(b) simply
9 reflects the belief that at a minimum the United States
10 should be held to the same standard in litigating as private
11 parties. As such, it is consistent with the history of
12 Section 2412 which reflects a strong movement by Congress
13 toward placing the federal government and civil litigants on
14 completely equal footing. That sounds like a waiver if it
15 relates to the Federal Rules of Civil Procedure.

16 Well, the rule of civil procedure that we are
17 relying on here is Rule 65(c), which says the Court may
18 issue a preliminary injunction or a temporary restraining
19 order only if the movant gets security in an amount that the
20 court considers proper to pay the costs and damages
21 sustained by any party found to have been wrongfully
22 enjoined or restrained. This is the equivalent of a
23 contract. I will cite some authority as to why this is not
24 a tort claim. This is a contract claim.

25 This contract is between parties and the court,

1 where you have a party that comes to the court and gives you
2 papers and says, especially ex parte, okay, we want an ex
3 parte temporary restraining order, and unless you are the
4 United States, you have to post security. The reason that
5 you have to post security is because if you are wrong, if it
6 ultimately turns out that the injunction that you went in on
7 and got and were wrong about caused damages, caused the
8 other side to incur harms, attorneys' fees and costs, then
9 you are responsible for those costs and damages. It says it
10 right in 65(c).

11 Now, the F.T.C. would probably point to the next
12 sentence. The next sentence says the United States, its
13 officers and its agencies are not required to give security.
14 Well, why does it say that? The reason that you have a
15 provision relating to the posting of security is to make
16 sure that there is something against which the enjoined
17 party can collect against. What this provision does is it
18 exempts the United States, because the United States,
19 presumably, has enough money to pay any costs or damages
20 that result from a wrongfully entered injunction.

21 But there is nothing in here that exempts the
22 United States government from liability for obtaining an
23 injunction that later is reversed, which is what happened
24 here.

25 THE COURT: Well, I'm sure that your opponent

1 would say that it is not a matter of exempting them from
2 liability, it is that sovereign immunity has never been
3 waived to cause them to be even possibly liable for
4 liability. Liable for --

5 MR. HAFEN: I'm with you, Your Honor.

6 That is what 2412 is all about. 2412 expressly
7 says that if you have a statute, and here 65(c) has the
8 force of a statute under the United States Supreme Court
9 case that we cited, if you have a statute and if you are a
10 prevailing party, then sovereign immunity is waived for
11 purposes of attorneys' fees and costs.

12 THE COURT: Well, it talks about a prevailing
13 party.

14 MR. HAFEN: Right.

15 THE COURT: Maybe there is something in your brief
16 that I have overlooked, but tell me where it tells me that
17 the winner or not loser, whatever we want to say, in a
18 preliminary injunction battle, is a prevailing party in the
19 spirit of this or within the reach of 2412(b).

20 MR. HAFEN: Well, our position on that is that we
21 were a prevailing party as to whether or not the injunction
22 was wrongful and that part is over. There is nothing more
23 to be done on that issue. Unfortunately, there is no
24 authority on either side of this issue. You're going to be
25 setting law --

1 THE COURT: Well, I --

2 MR. HAFEN: -- on how that works, Your Honor.

3 THE COURT: Maybe not setting law. You're telling
4 me the law is already there. I am just the first one to
5 rule on it.

6 MR. HAFEN: Well, if you --

7 THE COURT: What if there is an objection at a
8 trial and somebody says, objection, hearsay, and the other
9 side says, no, I am not offering it for the truth? We have
10 a prevailing party.

11 Do I award attorneys' fees?

12 MR. HAFEN: Do you mean for that single instance?

13 THE COURT: This is a single, and I don't mean
14 that to be facetious, I am just saying that this statute has
15 generally been understood, when it says that the Court may
16 award reasonable fees and expenses of attorneys to the
17 prevailing party in a civil action brought by or against the
18 United States or any agency in any civil action, don't we
19 wait until the action is over before we start to talk about
20 who gets fees and costs?

21 I did an absurd thing to take it down to one
22 evidentiary objection, but there may be a big battle over
23 that piece of evidence in a motion in limine that would
24 consume a fair bit of briefing and oral argument time and
25 you would have a prevailing party. I just wonder if you

1 have any authority to tell me that I can read prevailing
2 party in a civil action here and make it a step along the
3 way in the path to the end of the case.

4 Otherwise, I could be getting a motion after the
5 end of this hearing today. If you win and they lose, you're
6 going to ask me for your attorneys' fees with respect to
7 this hearing or this motion.

8 MR. HAFEN: Well, that is not the way that I see
9 it. The way I see it is that you become a prevailing party
10 for purposes of Rule 65(c) when you get an order from the
11 Court saying that an injunction was improvidently granted.
12 At that point you are a prevailing party in an action, and
13 you are entitled to fees under Rule 65(c), which is the
14 statute which we are pursuing.

15 THE COURT: How do you get there? I know that is
16 your position, but you don't have any case law on that, and
17 you --

18 MR. HAFEN: Let me just give you an example. This
19 is a state court case. I actually brought copies of the
20 order, if you would like to see it. Liz Marketer versus
21 Enoch. It was a case in front of Judge Quinn. It is a
22 similar situation. You have a case that is ongoing and you
23 have a plaintiff, and I represented the defendant in that
24 case as well, and they came in on an ex parte T.R.O. and
25 there was a receiver in place in the case just like this

1 one, so they came in and they got a T.R.O. on an ex parte
2 basis, and they claimed that my client was doing things he
3 was not supposed to be doing as far as engaging in behavior
4 with other companies that he was not supposed to be engaging
5 in.

6 It turned out that that was completely wrong. The
7 parties came back to the Court and the Court said, all
8 right, the injunction was improvidently granted and,
9 therefore, awarded fees and costs to my client, including
10 the receiver's expenses, by the way, and it was about
11 \$60,000 at that point in the case, because my client had
12 prevailed in the case --

13 THE COURT: Is there a --

14 MR. HAFEN: -- as to a wrongfully entered
15 injunction.

16 THE COURT: Is there a Utah law similar to this
17 2412(b) from --

18 MR. HAFEN: Not 2412(b), but certainly Rule 65 is
19 the same. Remember, the Equal Access To Justice Act --

20 THE COURT: Are you telling me Rule 65 in the Utah
21 Rules of Civil Procedure is identical to Rule 65 in
22 the federal rules?

23 MR. HAFEN: It is not exactly the same.

24 THE COURT: But I thought you just said that
25 certainly 65 --

1 MR. HAFEN: It is similar. I mean --

2 THE COURT: I thought in the state -- I
3 interrupted you. I'm sorry.

4 MR. HAFEN: That is okay.

5 THE COURT: I thought in the state system they had
6 a different rule with regard especially to T.R.O.s, which I
7 like better --

8 MR. HAFEN: I know that it is different,
9 but --

10 THE COURT: -- which allows sort of a freezing of
11 everything while people can take ten days and sort stuff
12 out.

13 MR. HAFEN: It is true that that part is
14 different, but what is not different is that both of the
15 rules provide that if the T.R.O. ends up being improvidently
16 granted, then the party against whom the injunction was
17 improvidently granted is entitled to its fees and damages as
18 a result of what wrongfully happened.

19 THE COURT: Of course 65(c), as a matter of
20 statutory or rule construction -- well, let's read it
21 together slowly. This is the whole thing. Security. The
22 court may issue a preliminary injunction or temporary
23 restraining order only if the movant gives security in an
24 amount that the Court considers proper to pay the costs and
25 damages sustained by any party found to have been wrongfully

1 enjoined or restrained. That is the section that you like.
2 If it ended there you would be fine.

3 Right?

4 But then the next sentence says the United States,
5 its officers and its agencies are not required to give
6 security, so the operative language in the opening sentence
7 is that the Court can only do this if the movant gives
8 security. Then the last line says the United States is not
9 required to give security. It seems like a literal reading
10 of that rule, Mr. Hafen, would say, well, this has no
11 application to the United States.

12 MR. HAFEN: I disagree with that. Here is why.

13 THE COURT: Okay.

14 MR. HAFEN: We have cited a number of cases, and I
15 am trying to find them in my notes here, that say -- we have
16 got the Monroe case vs. Debarri, we have got the Kansas vs.
17 Adams decision, which were both Tenth Circuit cases, and
18 then we have the Norco case, which is a Washington case from
19 1986, and all of those cases go to this issue. They go to
20 the issue of whether or not exempting someone from the
21 requirement to post security also exempts them from the rest
22 of that statute or that rule. The answer is that it
23 doesn't.

24 THE COURT: Did all of these involve private
25 parties?

1 MR. HAFEN: They did involve private parties, but,
2 remember, again, the Equal Access To Justice Act is an act
3 that is intended by congressional intent to waive sovereign
4 immunity so that the United States government, when it comes
5 to the Federal Rules of Civil Procedure, is standing on
6 equal footing with private litigants. What each of these
7 cases says is that -- one of these involved the government,
8 but what each of these say -- let me quote from Norco. A
9 party that is exempt from the bond requirement is in the
10 same position as if it posted it. In other words, this
11 sentence simply says that because the federal government has
12 the financial resources to handle any judgment that could be
13 entered against it for costs and damages, that does not mean
14 that they don't have responsibility for what they cause when
15 they come to the court and obtain a T.R.O. based on
16 information that is extremely wrong, which is what happened
17 here.

18 As I pointed out earlier, we talked about
19 statutory construction, we talked about reading the language
20 of this rule, but the rule does not say the United States,
21 its officers and its agencies are not required to give
22 security or to pay the costs and damages sustained by any
23 party to have been wrongfully enjoined or restrained. It
24 stops. That is based on its financial ability. That is not
25 based on immunity.

1 Again, if you look at the Adamson case and you
2 look at the legislative history of the Equal Access To
3 Justice Act, the federal government with respect to all of
4 the rules of civil procedure, particularly those under which
5 fees can be awarded, which include Rule 11, which includes
6 Rule 37, and it includes Rule 65, and under all of those
7 rules the United States has waived sovereign immunity. That
8 is important from a policy standpoint.

9 THE COURT: I have always been told that a waiver
10 of sovereign immunity needs to be clear and unambiguous.

11 MR. HAFEN: That is the law. Whoever told you
12 that was right. I don't contest that, Your Honor.

13 THE COURT: Well, there is nothing really clear
14 about 65(c) here, is there, and about waiving governmental
15 immunity in a rule which specifically says the government
16 does not have to post security, the posting of which was
17 supposed to ensure that these kinds of fees and expenses
18 would be paid? I am not even sure what wrongfully enjoined
19 means.

20 What do you think that means in this section?

21 MR. HAFEN: Wrongfully enjoined means that a party
22 is kept from doing something that it should have been
23 allowed to continue doing. In this case, and I am sure you
24 recall all of this, but this wrongfully entered T.R.O.
25 caused significant damages to the Sonnenbergs.

1 Here is what happened. The F.T.C. comes in and
2 says common enterprise, common enterprise, refers to
3 defendants, lumping the Essent Media defendants and the
4 Sonnenberg defendants together, and based on all of the
5 defendants being lumped together, then all of the
6 allegations about wrongdoing and about earnings claims and
7 so forth and then attributed by this Court to my clients and
8 a T.R.O. is entered and a receiver is appointed.

9 The receiver comes in under the auspices of the
10 T.R.O. and essentially shuts down the business while the
11 T.R.O. was in place, which is about five to six weeks. They
12 do not allow the Sonnenberg companies to continue servicing
13 customers, who have this contractual right to receive
14 coaching services, and the receiver takes away access to the
15 business bank accounts, and also to the personal accounts of
16 the Sonnenbergs. The result of that was devastating.

17 Let me give you a couple of examples.

18 THE COURT: I don't need them. I don't really
19 want them. I am not a jury.

20 MR. HAFEN: Then I am not going to give them to
21 you.

22 THE COURT: I am not a jury. I am trying to
23 decide if sovereign immunity has been waived, the
24 egregiousness of it notwithstanding.

25 MR. HAFEN: That is where I started, Your Honor.

1 I want to make two points.

2 One of them is, and this is separate and I'm going
3 to give you something new, and that is that a claim for
4 wrongful injunction is a contract claim. We have cited
5 authority to that effect, and that is the Marine
6 Construction case, which says that, quote, almost all states
7 classify a wrongful injunction action as an action in
8 contract, not tort. If it is a contract action, the Federal
9 Tort Claims Act does not apply. Immunity has been waived by
10 the government under the Tucker Act for contract claims.

11 Now, granted, for that type of contract claim we
12 may need to go to the Court of Claims. If the Court is
13 saying that no matter how bad the conduct under Rule 65(c),
14 I have no jurisdiction to award you anything because I don't
15 believe sovereign immunity has been waived, then we would
16 request a couple of things. One is to allow us the
17 opportunity to go and bring this contract based wrongful
18 injunction claim before the Court of Claims. The other
19 thing we intend to do with respect to the tort claim is to
20 pursue that tort claim by making the claim that we didn't
21 make. We said to the Court in candor we realize with our
22 intentional interference with the contract claim we needed
23 to file that claim and we have not done it yet. We have
24 agreed that that can be dismissed without prejudice so that
25 we can go forward.

1 THE COURT: You mean you needed to file it with
2 the agency?

3 MR. HAFEN: Right.

4 THE COURT: Okay.

5 MR. HAFEN: With respect to those two aspects,
6 that is how we want to proceed. Again, with respect to
7 65(c), all I can do is just ask the Court to read the
8 Adamson case and to look at 2412.

9 THE COURT: Adamson dealt with Rule 11; is that
10 correct?

11 MR. HAFEN: That is correct, but the principle is
12 the same. Rule 65(c), just like Rule 11 and Rule 37, says
13 that in certain circumstances under the rules a party can be
14 required to pay fees. That is all Rule 65(c) is. You're
15 required to pay costs and damages which include fees, and so
16 we are simply saying to create the federal government here
17 like a private litigant, which is exactly what Congress
18 intended, based on the legislative history that is set forth
19 in the Adamson case.

20 THE COURT: Again, the problem I guess I'm having
21 with that, and I have not looked at Rule 11, and I am right
22 now, but I would think that Rule 11 is as applicable to the
23 United States and its agencies lawyers as to everyone else.
24 There is nothing in Rule 11 that exempts lawyers
25 representing the F.T.C., for example, right?

1 MR. HAFEN: Correct.

2 THE COURT: Well, that would make an easier
3 argument, that Section 2412(b) waives sovereign immunity as
4 to Rule 11 sanctions. United States agencies lawyers are as
5 subject to sanctions by violating Rule 11 as any other
6 attorney.

7 MR. HAFEN: Right.

8 THE COURT: Again, I'm repeating myself, but when
9 I go to 65(c), the very rule that you want to give you all
10 of this benefit, it specifically exempts the United States
11 and its agencies from giving the very security that is to
12 pay the costs and damages that you want them to pay. You
13 don't have any case to support this, and --

14 MR. HAFEN: Well, what we have got are the cases
15 that say that merely because based on your financial
16 position you're not required to post a bond does not mean
17 that you're not responsible for the fees and costs that are
18 awardable under 65(c).

19 THE COURT: As to nongovernment parties.

20 MR. HAFEN: Nongovernment parties, but then that
21 brings us back to Rule 2412, which says that the whole
22 purpose of that, with respect to waiver of immunity, is to
23 put the federal government on equal footing with respect to
24 all other litigants. The only exception to that under Rule
25 65(c) is that they don't have to post a bond. There is no

1 exception to Rule 65(c) that says that they are not
2 responsible for the damages that the wrongfully entered
3 injunction causes.

4 THE COURT: Rule 65(c) does not say anything about
5 anything other than this security requirement. It is not a
6 general section that says that everyone who obtains a
7 wrongfully obtained or wrongfully procured T.R.O. will be
8 subject to pay the costs and fees incurred by the party
9 against whom they obtained the order. If it said that, that
10 would be something. That would be a pronouncement of legal
11 entitlement.

12 In fact, its heading is security. It does not
13 have that kind of general pronouncement. It just says a
14 judge may order a T.R.O. or a preliminary injunction only if
15 the party getting it gives security to pay this. That is
16 all that it says.

17 MR. HAFEN: Well, I'm sorry, but I disagree. That
18 is not all it says. It says security --

19 THE COURT: To pay.

20 MR. HAFEN: -- to pay the costs and damages
21 sustained by any party.

22 THE COURT: That is all.

23 MR. HAFEN: That presumes, and this is what
24 happened in the Liz Marketer case, granted it was on the
25 state court side, and, unfortunately, we can find cases on

1 either side, the F.T.C. can't and we can't either, so we
2 don't know what has happened in Federal Court with respect
3 to this, and --

4 THE COURT: Well, you talked Judge Quinn into
5 that, and it was in a state law system that is different
6 from this one, and, unfortunately, he is no longer with us.
7 I don't know what he was thinking.

8 MR. HAFEN: That is sad that he is not around, and
9 that is sad, but as far as a case that is very similar to
10 this one, that is the best that we have as far as an actual
11 case. All I can do is simply urge the Court to review the
12 other cases that we have provided in a number of settings
13 where a party who obtains a wrongfully entered injunction is
14 responsible for the damages that are caused by that
15 injunction.

16 THE COURT: Where the United States obtains it,
17 not a party --

18 MR. HAFEN: We don't have a case that relates to
19 the United States either way. There is not one either way.
20 I am simply giving you what I believe is the correct view of
21 Rule 65(c) and the Equal Access To Justice Act, which says
22 that for purposes of awarding fees under the Rules of Civil
23 Procedure, they are just like a civil litigant, any other
24 civil litigant, private litigant, and if that is true, then
25 all of those cases where people moved forward and got

1 damages and fees as a result of a wrongfully entered
2 injunction would apply equally to the United States.

3 THE COURT: But you agree that, as far as we know,
4 this would be the first time in history that the United
5 States has ever had to pay or had to be subject to a lawsuit
6 for the payment of fees and costs and damages that were
7 caused by the United States obtaining a preliminary
8 injunction or a T.R.O.?

9 MR. HAFEN: That is correct, but it also applies
10 going the other way. We have no precedent saying that it
11 can happen or can't happen. We have no precedent analyzing
12 that aspect of Rule 65. All I have got is that the
13 government needs to be treated like a private litigant under
14 the --

15 THE COURT: Inasmuch as it is the government that
16 is only subject to liability after it's waived sovereign
17 immunity makes it quite an intriguing question. The fact
18 that we have no instance of them ever having been required
19 to pay in these kinds of circumstances I think probably
20 speaks more loudly than that we don't have something going
21 the other direction.

22 MR. HAFEN: Well, that is up to you to decide,
23 Your Honor.

24 THE COURT: I am guessing that the United States
25 has obtained through various agencies, the S.E.C., the

1 F.T.C., pick an acronym, a lot of preliminary injunctions
2 and T.R.O.s over the years, and we have never had one lawyer
3 as clever as you to get the damages paid for by them and
4 attorneys' fees.

5 MR. HAFEN: I have a different view on that. I
6 have a different view, Your Honor. This is important. I
7 believe the F.T.C. went over the edge on this T.R.O. I
8 believe that one reason we don't have that authority is
9 because the government generally is far more careful than
10 they were here.

11 We are only aware of two cases in the country in
12 which an injunction obtained by a federal agency, in which a
13 receiver was appointed, has been dissolved and the receiver
14 dismissed, two cases, and one of them was this case.

15 THE COURT: Was the other one an ex parte T.R.O.?

16 MR. HAFEN: I don't believe so.

17 We made some history in what happened in this
18 case, and I see no problem in making some more history. I
19 think that the F.T.C. needs to have financial consequences
20 for going and doing what it did here.

21 THE COURT: Well, I'm not taking a position on
22 that. I'm a judge. Even if I agreed with you, I would need
23 some law to support it. That is the hard part here.

24 MR. HAFEN: I still think the law is there under
25 2412. I think it is right there. You take 2412 and the

1 Adamson case and Rule 65 and I think it would hold up.

2 THE COURT: Okay. Thank you.

3 Let me ask you one more question. Is your
4 counterclaim limited to attorneys' fees and costs?

5 MR. HAFEN: No.

6 THE COURT: Then how do you get that additional
7 claim for damages? 2412 does not talk to damages.

8 MR. HAFEN: Well, that would be under D, which has
9 a broader definition of expenses, but I would concede that
10 with respect to the other damages under Rule 65, that we're
11 probably going to have to go to the Court of Claims on that,
12 because I don't see that under Rule 2412. I don't see that
13 in B or D.

14 THE COURT: What is your theory there?

15 MR. HAFEN: It is contract based. An injunction
16 is contract based and, therefore, for breaches of contract
17 the federal government has waived immunity.

18 THE COURT: Where did that waiver occur?

19 MR. HAFEN: The Tucker Act.

20 THE COURT: Okay. Thank you, Mr. Hafen.

21 MR. HAFEN: I want to make sure that I am being
22 clear, because I get the sense that you may not be going
23 with me on 2412 as to being able to file a motion for fees
24 and costs under Rule 65(c). I want to make sure that I am
25 being very clear, that if the Court is not with me on that,

1 that we want to have the opportunity to pursue our
2 administrative claim with the F.T.C. and also pursue our
3 contract based claim with the Court of Claims.

4 THE COURT: Now, if I granted their motion here,
5 and that would be against you, setting aside for a moment
6 that they would be the prevailing party on that, but if I
7 did, and I am not saying that that is what I am going to do,
8 but how would that affect your ability to make that case
9 before the Court of Federal Claims?

10 MR. HAFEN: They are asking you dismiss with
11 prejudice.

12 THE COURT: Okay. Thank you, Mr. Hafen. Very
13 interesting.

14 Mr. McNulty.

15 MR. McNULTY: Your Honor, let's start with Mr.
16 Hafen's position that it is not a tort claim, that the
17 wrongful injunction claim they have brought is not a tort
18 claim. It is a tort claim. They allege animus and they
19 allege intentional conduct. That is not the type of
20 pleading you see in a contract claim. I think it is
21 important to point out that this is a motion to dismiss. We
22 look at the allegations in the complaint, not how those
23 allegations may want to be repled in briefing papers. In
24 the complaint they allege tortious conduct. If it is a
25 tort, and if it is a tort against the United States, which

1 it is, you go to the Federal Tort Claims Act and there is no
2 waiver of sovereign immunity.

3 THE COURT: How did you style it in your
4 counterclaim? That is one thing I have not done is looked
5 at the way you phrased it. Did you style it as a contract
6 claim?

7 MR. HAFEN: Here is the issue with that, Your
8 Honor. It is very clear. When we filed this to start with,
9 we said intentional interference with a contract, and then
10 we also had a wrongful injunction and, as I said, we have
11 now realized that we cannot proceed absent exhausting
12 administrative remedies with the tort claim, and what
13 counsel for the F.T.C. is doing is referring to the language
14 earlier in the counterclaim that went to our tort claim,
15 that we're saying we know has to go somewhere else.

16 THE COURT: How did you plead --

17 MR. HAFEN: Let me read to you what the wrongful
18 injunction claim says. The first cause of action, wrongful
19 injunction, upon fundamentally flawed and incorrect
20 allegations, the F.T.C. sought and obtained, after giving no
21 notice to the Sonnenberg companies, a T.R.O. prohibiting, et
22 cetera. At all relevant times the Sonnenberg companies had
23 the right to do these and other enjoined acts.

24 THE COURT: Slow down just a little.

25 MR. HAFEN: Sure.

1 THE COURT: Ed is having a hard time.

2 MR. HAFEN: Sorry, Ed.

3 THE COURT: You talk fast anyway, and when you
4 read you --

5 MR. HAFEN: He has warned me before. I am just
6 trying to --

7 THE COURT: So have I.

8 MR. HAFEN: Thus, the T.R.O. urged on the Court by
9 the F.T.C. was wrongfully entered, and the F.T.C. never had
10 proper grounds for requesting and obtaining the T.R.O., and
11 wrongful entry of the T.R.O. damaged the Sonnenberg
12 companies. There is nothing in there about it being a tort
13 or about animus or anything else. We are simply saying that
14 it is a wrongful injunction.

15 MR. McNULTY: Your Honor, that ignores the first
16 30 paragraphs of the counterclaim.

17 THE COURT: Were those general allegations
18 paragraphs?

19 MR. McNULTY: They are general allegations
20 paragraphs. They don't say that they go to count one or
21 count two of the counterclaim.

22 THE COURT: This count, the wrongfully obtaining
23 of an injunction, does it incorporate those earlier
24 paragraphs, I take it?

25 MR. HAFEN: It does.

1 MR. McNULTY: It does. Yes, Your Honor.

2 THE COURT: All right.

3 MR. McNULTY: Beyond what is in the counterclaim,
4 which is pled as a tort, there is no such thing under Utah
5 law as a contract claim for wrongful injunction. Gilbert
6 vs. Ence, the Utah Supreme Court, and it is a wrongful use
7 of civil proceedings, which is, of course, the civil side of
8 a malicious prosecution claim, the Utah Supreme Court states
9 that wrongful use of civil proceedings requires that suits
10 brought without probable cause for the purpose of harassment
11 and annoyance and with malice, and these are the allegations
12 that the Sonnenbergs have leveled against the F.T.C. Harris
13 vs. Zurich Holding Company, identifying the wrongful use of
14 civil proceedings and abuse of process as intentional torts,
15 not as contract claims. Junction Irrigation Company vs.
16 Snow, the Utah Supreme Court, quote, in the absence of the
17 elements of an action for malicious prosecution, it is
18 established by the great weight of authority that no action
19 will lie by a defendant in an injunction suit independent of
20 a bond or undertaking for damages for the wrongful suing out
21 of the injunction.

22 Corporation of the President of the Church of
23 Jesus Christ of Latter-Day Saints vs. Wallace, the Utah
24 Supreme Court, it is the well established general rule that
25 there is no liability in tort for the damages caused by the

1 wrongful suing out of injunction unless the circumstances
2 give rise to a cause of action for malicious prosecution.

3 These rulings are echoed in Adolph Coors Company
4 vs. A & S Wholesalers Incorporated, Tenth Circuit, where you
5 cannot have a claim for wrongful injunction that is not a
6 tort. There is no contract claim under Utah law for
7 wrongful injunction. There is no Tucker Act claim here.
8 This is a tort. It is pled as a tort and it does not
9 survive as a tort.

10 THE COURT: Is that Tenth Circuit case in your
11 brief?

12 MR. McNULTY: It is, Your Honor.

13 THE COURT: Point me to the page, would you mind?
14 Is it in your reply brief or your opening brief?

15 MR. McNULTY: That I would have to find, Your
16 Honor. I don't remember offhand.

17 THE COURT: Probably in your reply brief.

18 MR. McNULTY: It is on page 4 of the reply brief.

19 THE COURT: Which case are you referring to, the
20 Adolph Coors Company --

21 MR. McNULTY: Adolph Coors Company vs. A & S
22 Wholesalers Incorporated.

23 THE COURT: I thought I just heard you say that a
24 wrongful injunction allegation sounds in tort and not
25 contract?

1 MR. McNULTY: That is correct, Your Honor.

2 THE COURT: Can you give me a quote or something
3 from the case? That would be nice to hear.

4 MR. McNULTY: Sure.

5 THE COURT: That would be on point.

6 MR. McNULTY: This is from my notes, and I think
7 this is accurate, but I can't verify it 100 percent. I will
8 give you the citation and that may help. It is Adolph Coors
9 Company versus A & S Wholesalers Incorporated, 561 F2nd,
10 807, page 813, the Tenth Circuit, 1977. The general rule is
11 that damages resulting from a wrongfully granted injunction
12 are limited to the amount of the bond unless it is
13 established that the injunction was obtained maliciously or
14 without probable cause. So you either have a bond or you
15 have a malicious prosecution claim. There is no bond here
16 and so the only avenue for a wrongful injunction claim under
17 Utah law is malicious prosecution, not contract.

18 Now, Mr. Hafen and the Sonnenbergs cite to the
19 Marine case to prove that this claim is a contract claim,
20 Marine Construction and Dredging. That case, again,
21 supports the F.T.C.'s position. It holds that wrongful
22 injunction claims that rest on allegations of malicious
23 prosecution sound in tort, not in contract. That case was
24 also interpreting Washington state law where there was an
25 implied bond. There is no implied bond under Rule 65. The

1 United States is exempt from posting a bond.

2 One point we do agree with Mr. Hafen on is that
3 the E.A.J.A. is, indeed, a limited waiver of sovereign
4 immunity, but it is limited by its terms. It is not a
5 limited waiver of sovereign immunity for damages. Section B
6 is a limited waiver for reasonable fees and expenses of
7 attorneys.

8 Section 2412(d)(1)(a) is a limited waiver for fees
9 and other expenses. The statute defines what fees and other
10 expenses are. It states that they include the reasonable
11 expenses of expert witnesses, the reasonable costs of any
12 study, analysis, engineering report, test or project which
13 is found by the court to be necessary for the preparation of
14 the party's case in addition to reasonable attorneys' fees.
15 There is nothing in that definition that mentions damages.
16 There is nothing that remotely connects it to damages.

17 2412, the E.A.J.A. is, indeed, a limited waiver of
18 sovereign immunity, but not for damages. Even if it were a
19 limited waiver for damages, the Sonnenberg defendants are
20 not prevailing parties in this case. They have obtained no
21 relief on the merits. They are subject to the same claims
22 they were subject to when the case was brought. They have
23 no relief yet from those claims. They are not prevailing
24 parties.

25 THE COURT: Do you read the prevailing party in

1 any civil action to mean the party that prevails at the end
2 of the litigation?

3 MR. McNULTY: I think it is possible, Your Honor.
4 In most cases, yes, the prevailing party would be the party
5 at the end of the litigation. There are cases where the
6 prevailing party ends before there is a final -- where a
7 party obtains prevailing party status before there is an
8 actual final judgment. The Sonnenbergs cite one of those
9 cases, the Maine school case. In that case the school
10 district of Maine brought an injunction to keep a child, a
11 disabled child from attending mainstream classes. The
12 child's parents challenged that complaint, challenged the
13 injunction and they won.

14 The State of Maine then dropped the case. The
15 only relief that the school board in Maine sought was to
16 keep the child out of class. The parents won that case and
17 they became prevailing parties because they defeated the
18 entire claim. They defeated the only relief that the school
19 district had sought. That is quite different from what we
20 have here.

21 THE COURT: Well, you cite the Lorillard Tobacco
22 Company case from the Tenth Circuit in your brief, which I
23 think is similar.

24 MR. McNULTY: It is, Your Honor.

25 THE COURT: Okay. Other than that circumstance,

1 prevailing party is anticipating somebody who prevails at
2 the end of the litigation.

3 MR. McNULTY: I think in 99 percent of the cases
4 you're going to find that, Your Honor, yes.

5 I think there may be one more issue after this
6 that I want to address.

7 Rule 65, to the extent that the Sonnenbergs allege
8 that it is an independent waiver of sovereign immunity, or
9 that it is a waiver of sovereign immunity in conjunction
10 with Section 2412, is simply incorrect. Rule 65 contains no
11 express, unequivocal waiver of sovereign immunity. You
12 pointed out that there is no language in there that says
13 that the United States is liable for wrongful injunction
14 damages. It is not there. The waiver of sovereign immunity
15 must be expressly stated by Congress in a statute. That is
16 not there in Rule 65.

17 There are two district court cases that have
18 addressed this issue. In Shafer vs. Commissioner of the
19 I.R.S., and the citation is 515 FSup 748, page 751, from the
20 Eastern District of Louisiana, and it is from 1981, and
21 there the district court held that Rule 65 does not alter
22 federal jurisdiction, but rather provides for general
23 injunctive relief without contemplating a sovereign immunity
24 waiver.

25 There is also Fanoso vs. S.E.C., 2008 WesLaw

1 35221351 at page 4, note 4, holding that Rule 65 does not
2 provide a waiver of sovereign immunity. To be clear, in the
3 Fanoso case the court wrote that opinion and it was
4 unopposed. No one opposed the S.E.C.'s motion, and still
5 the court did issue that opinion.

6 There are district courts who have dealt with this
7 issue, at least two of them, and they have both found that
8 Rule 65 is not a waiver of sovereign immunity.

9 One last point. The Sonnenbergs cite to Norco
10 Construction vs. Kane County as proof that a bond can be
11 implied. That is simply not the case. Norco Construction
12 was a Washington state case and it was based on Washington
13 state law. It is not transferable to the federal system
14 where we have Rule 65 as written.

15 The Sonnenbergs also cite the State of Kansas, and
16 Kansas in that case and a number of others went into federal
17 court and sought an injunction against Amtrak and lost as I
18 recall. In doing so, Amtrak sought relief. Kansas and the
19 other sovereigns were subordinate sovereigns. They waived
20 their sovereign immunity upon entering federal court. That
21 is quite different from the Federal Trade Commission in this
22 case.

23 Unless Your Honor has any other questions, I think
24 that is the end of our rebuttal.

25 THE COURT: I don't. Thank you, Mr. McNulty.

1 Mr. Hafen?

2 MR. HAFEN: Can I be heard on a couple of things?

3 THE COURT: Of course. I would be happy to hear
4 anything you want to say.

5 MR. HAFEN: I am not sure that is true.

6 One of these is from Sara and the other one is
7 from me. Here is the one from Sara. She wanted to make
8 sure that I emphasized to the Court that under 2412(d) no
9 statute is necessary, so the Rule 65(c) analysis does not
10 apply. Under B it talks about a statute, and we are arguing
11 that Rule 65(c) is a statute, and under D no statute is
12 required. The point that I'm making there, Your Honor, is
13 that we don't want anything that the Court does today to
14 somehow preclude our client from being able to move for
15 attorneys' fees at the end of this case under 2412(d).

16 The other thing that I wanted to do was just quote
17 from the Monroe Division case. This case came out after the
18 Coors case, and it says that we pointed out that Rule 65(c)
19 creates a cause of action for costs and damages incurred by
20 an enjoined party by reason of a wrongful injunction. The
21 rule controls and negates the concept that recovery may only
22 be based on malicious prosecution.

23 Continuing on, and that is contrary to what you
24 have just heard from the prior case --

25 THE COURT: What court is speaking?

1 MR. HAFEN: Tenth Circuit.

2 Continuing on, in Continental Oil Company vs.
3 Frontier Refining, we held that the security requirement of
4 Rule 65 gave the trial judge the discretion to dispense with
5 a security bond when the applicant for the injunction had
6 considerable assets and was able to respond in damages.
7 Monroe argues that without the posting of security there may
8 be no recovery of damages or restitution from the applicant
9 for the injunction, even though the preliminary injunction
10 was modified to make it less restrictive.

11 Implicit in our decision in Atomic Oil is
12 recognition that Rule 65 mandates security for the
13 protection of the person enjoined, and that protection is
14 not eliminated when the court relies on the financial
15 strength of the party seeking the injunction in place of the
16 security of a bond. To hold otherwise would make a farce of
17 the rule and of our Continental Oil decision.

18 I think that that quote goes directly to the heart
19 of my position, which is that you have to look at Rule 65(c)
20 just like you would Rule 37 or Rule 11. Rule 11 and Rule 37
21 don't expressly waive sovereign immunity either, but we have
22 a situation where at least under Rule 11, as we have noted,
23 the United States government has been found responsible
24 under 2412(b).

25 Think you.

1 MR. McNULTY: May I?

2 THE COURT: Yes, sir, please.

3 MR. McNULTY: With regard to Rule 2412(d),
4 Mr. Hafen is right that it does not make reference to -- you
5 don't need reference to a statute or the common law,
6 nonetheless, Rule 2412(d) still has the prevailing party
7 provision, and 2412(d) applies only to tort claims. As we
8 have discussed, this is a tort claim. It is not a contract
9 action and Rule 2412(d) is inapplicable.

10 The Monroe Division case, whatever its
11 precedential value at the time it was decided, and it was
12 decided in 1977, subsequently in W.R. Grace vs. Local Union
13 759, the Supreme Court held that outside of a malicious
14 prosecution, you need a bond to get wrongful injunction
15 damages. So without a bond there is no wrongful injunction
16 damages.

17 THE COURT: Thank you.

18 MR. HAFEN: There is one more thing, Your Honor --

19 THE COURT: Yes.

20 MR. HAFEN: -- I have just got to say, and that is
21 under 2412(d), you're looking at the action of the F.T.C. as
22 far as fees and expenses. If we prevail in this case as to
23 the F.T.C.'s part of the case, then that does not sound in
24 tort and we are entitled to our fees under D. That was the
25 point that I was trying to make.

1 Does that make sense?

2 THE COURT: It does.

3 MR. HAFEN: Thank you.

4 THE COURT: Is there a dispute about whether you
5 will be entitled to your reasonable fees and expenses of
6 attorneys if you prevail if this thing, for example, went to
7 trial?

8 MR. HAFEN: I hope not.

9 THE COURT: Well --

10 MR. HAFEN: I just wanted to be sure.

11 THE COURT: I have not heard that from the
12 government and that is not before me.

13 The motion is granted. I find that there is no
14 express and unequivocal waiver of governmental immunity as
15 always has been required. I don't find it through a
16 combination of Section 2412 in Title 28 or Rule 65(c) of the
17 Federal Rules of Civil Procedure or a combination, nor am I
18 persuaded that this was an action sounding in contract, a
19 wrongful injunction claim.

20 From my understanding of the basis upon which this
21 claim is brought, it is one sounding in tort and resembling
22 a malicious prosecution or wrongful use of civil proceedings
23 claim. I am confident enough with that position that I will
24 announce the ruling from the bench and ask the F.T.C. to
25 prepare an order to that effect.

1 This is without prejudice. I'll allow you to do
2 whatever you want to under the little Tucker Act or the big
3 Tucker Act or whatever it is and take it to the Court of
4 Federal Claims.

5 Ms. Priest, did you want to say anything on this
6 motion that I just heard?

7 MS. PRIEST: No, Your Honor.

8 THE COURT: While you are here, I have pending the
9 matter I mentioned earlier regarding the request for the
10 receiver to receive fees and expenses under their windup
11 motion. Let me tell you where I am on that.

12 I am going to take it under advisement, but my
13 present inclination is to keep it under advisement for quite
14 some time. I don't think it is ripe yet. My present
15 inclinations are as follows, generally speaking, and I am
16 not ruling on it now, but I find from my review of the
17 briefing that has been presented that the fees are too high
18 for several reasons.

19 One, I think the prevailing rates are higher than
20 they needed to be for this proceeding in Utah. Number two,
21 I find, and I am not making a final ruling, but that some of
22 the work was duplicative and some of it was, in addition to
23 being overcharged, I find that some of it was unnecessary
24 and unreasonable without getting into specifics.

25 Two of the areas where I'm troubled by the amount

1 of work that the receiver did is with regard to the
2 Sonnenberg defendants and the activities that, according to
3 the Sonnenberg defendants, and I think these allegations
4 appear to have some merit, that the receiver was responsible
5 for interfering with an awful lot of their work. There were
6 contracts that were pending and required delivering services
7 relating to coaching services and the like to customers, and
8 that this was in my view preliminarily overreaching by the
9 receiver.

10 I'm also concerned that the F.T.C. was the reason
11 for the overreaching. It strikes me that this receiver was
12 working far more for the F.T.C. than it was for the Court.
13 I look back at this T.R.O., and I will say again I regret
14 granting it, but I am not saying, however, and I want to be
15 clear here, that it was wrongfully obtained. I have not
16 ever made that finding. I find that when I heard all of the
17 facts, I found that injunctive relief was not proper.

18 Many of the allegations made by the F.T.C. may in
19 the course of this lawsuit, if it gets pressed to a trial,
20 will be found to have been true, the allegations of
21 misrepresentations made by certain of the defendants at
22 certain times, especially, as I recall, with some of the
23 photographs they used and the testimonials attached to them
24 in the efforts to obtain customers.

25 But overall I think there was unnecessary work and

1 overreaching. I said with respect to the Sonnenberg
2 defendants that I find it to be in the area of interference
3 with the contracts they had with customers and especially in
4 the coaching services area.

5 With regard to the Essent Media defendants, I find
6 that the receiver went farther than I think was reasonable
7 and prudent, especially in the context of a T.R.O. This was
8 not a preliminary injunction. I know what the order I
9 signed said, but still I think the receiver went too far in
10 doing what the receiver is charged with having done, if not
11 directly, indirectly, that caused the cessation of the
12 health and wellness nutraceutical aspect of that business.

13 It was as if the receiver anticipated finding an
14 enterprise here which involved both the Sonnenberg
15 defendants and the Essent Media defendants and found it to
16 be a corrupt organization and it was going to shut it down.
17 They interviewed employees and they came in and took over
18 the account books and talked to a lot of people employed, as
19 I understand it, and pretty much did it in a way that
20 anticipated that this thing is fraught with fraud.

21 I have seen those kinds of enterprises and they
22 do, when faced with this kind of a T.R.O., often cut and
23 run, and you don't have anybody left to find and the money
24 is gone. My biggest regret in granting this T.R.O. was that
25 one that I was persuaded by the Federal Trade Commission

1 that these defendants were of that nature, that if I didn't
2 do this ex parte that the money would be gone and the
3 culprits would be mostly gone. They would have hidden their
4 tracks and for the most part the assets would not be
5 ascertainable, and from everything that I read in the
6 briefing that led up to the preliminary injunction and to
7 the information and arguments given at the preliminary
8 injunction hearing, I just found that I had improvidently
9 granted a T.R.O. and regret it.

10 I think receiverships should be used sparingly.
11 That is not the same as finding something on the order of
12 malicious prosecution, for whatever that is worth. In light
13 of all of that, I'm inclined to diminish the receiver's
14 request for reasonable and appropriate fees by probably
15 something on the order of half, if not more.

16 To the extent my equitable powers allow, it seems
17 unfair to have the Sonnenberg defendants, especially because
18 they didn't agree to any preliminary injunction going
19 forward as the Essent Media defendants did, to have them
20 have to pay for a receiver to come in and swoop in and do
21 all of this to their business, even though, as I have ruled
22 today, I don't see a waiver of immunity to allow them to sue
23 the F.T.C. for damages, I don't, but I am not sure who will
24 win if this goes to trial.

25 By finding that there was not a sufficient basis

1 for injunctive relief does not mean that I think that the
2 F.T.C. would lose at a trial. There was enough evidence to
3 have a case. As we all know, the standard for a preliminary
4 injunction is the likelihood of success on the merits. That
5 is a pretty hard burden to meet often, and I didn't find
6 that that was met.

7 Getting back to the request before me for the
8 receiver's payment, for a 36-day receivership to incur fees
9 and costs and attorneys' fees of close to a half a million
10 dollars strikes me as imprudent and improvident in this
11 situation. I won't rule on it until I know more. There are
12 so many facts here to sift through, and I'm not in a
13 position now where I feel comfortable in making a final
14 ruling.

15 One last point, which the Federal Trade Commission
16 will not enjoy hearing, and that is if I can find a way to
17 require the Federal Trade Commission to pay these
18 receivership fees, I will. I think they should pay them.
19 They recommended the receiver. They persuaded me that this
20 T.R.O. was proper. They should have to pay these fees if it
21 is legally allowed. I have a case from Florida and I have a
22 case from the Ninth Circuit that gives some indication that
23 a federal agency, such as the F.T.C., may be held
24 responsible for the payment of those fees where the Court
25 makes a finding that there was no real benefit to the

1 receivership estate, which I can't find here, any benefit to
2 the ongoing businesses that they took over.

3 I will keep that legal issue under advisement
4 until a later point during a trial. I am announcing it now
5 primarily for the purpose if there is any way that this case
6 comes to settlement talks or negotiations, that you might
7 factor this into it.

8 To summarize, I'm thinking that rather than 400 or
9 \$500,000, the appropriate fee would be about half of that,
10 and I am inclined to impose it against the Federal Trade
11 Commission if I can.

12 Anything else today? Did anyone want to ask a
13 clarifying question or anything about what I have just said,
14 because it is all an inclination. There is no final ruling
15 on anything.

16 MR. HAFEN: Not about that.

17 I have a clarifying question about the prior order
18 as far as to dismiss without prejudice, that applied to the
19 intentional interference claim as well as the contract
20 claim.

21 THE COURT: Yes.

22 MR. McNULTY: Your Honor, just on your inclination
23 with regard to the receivership fees, will we have an
24 opportunity to argue the legal issue before you make that
25 ruling?

1 THE COURT: Yes. We have not had a hearing on it,
2 and that is maybe why I thought I would bring it up today,
3 but I don't want a hearing prematurely. I thought a lot
4 about it. I have read it more than I have read most things
5 lately. It is a head scratcher for me. I think equity says
6 that the F.T.C. should pay it.

7 MR. McNULTY: I understand. We would just like
8 the opportunity to argue it if it ever comes up.

9 THE COURT: I think ex parte matters are fraught
10 with these kinds of risks. We are all advocates and we
11 think we have maybe more than we have when we seek an ex
12 parte anything, but you'll have the chance to argue it
13 before I make a final decision on that.

14 Anything else before we adjourn?

15 MR. HAFEN: No, Your Honor.

16 MR. McNULTY: No.

17 THE COURT: Any last words of wisdom, Ms. Priest?

18 MS. PRIEST: No, Your Honor.

19 THE COURT: We'll be in recess.

20 (Proceedings concluded.)
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